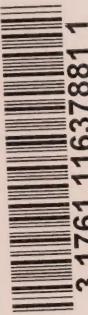


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NATIONAL ENERGY BOARD

REASONS FOR DECISION

In the Matter of

Arctic Pilot Project
Preliminary Motions



November 1981

NATIONAL ENERGY BOARD

REASONS FOR DECISION
In the Matter of
Arctic Pilot Project
Preliminary Motions

IN THE MATTER OF the National Energy Board Act
and the Regulations made thereunder;

AND IN THE MATTER OF an application by ARCTIC
PILOT PROJECT INC. for a Licence under Part VI
of the National Energy Board Act for the export
of natural gas from Canada to the United States
of America;

AND IN THE MATTER OF an inquiry and report
pursuant to subsection 22(2) of Part II of the
National Energy Board Act;

AND IN THE MATTER OF an application by
TRANSCANADA PIPELINES LIMITED for a Certificate
of Public Convenience and Necessity under Part
III of the National Energy Board Act, and for
orders under Part IV of the National Energy
Board Act relating to traffic, tolls and
tariffs.

November 1981

NATIONAL ENERGY BOARD

IN THE MATTER OF the National Energy Board Act
and the Regulations made thereunder, and

IN THE MATTER OF Arctic Pilot Project
Preliminary Motions, filed with the Board under
File No. 1539-4.

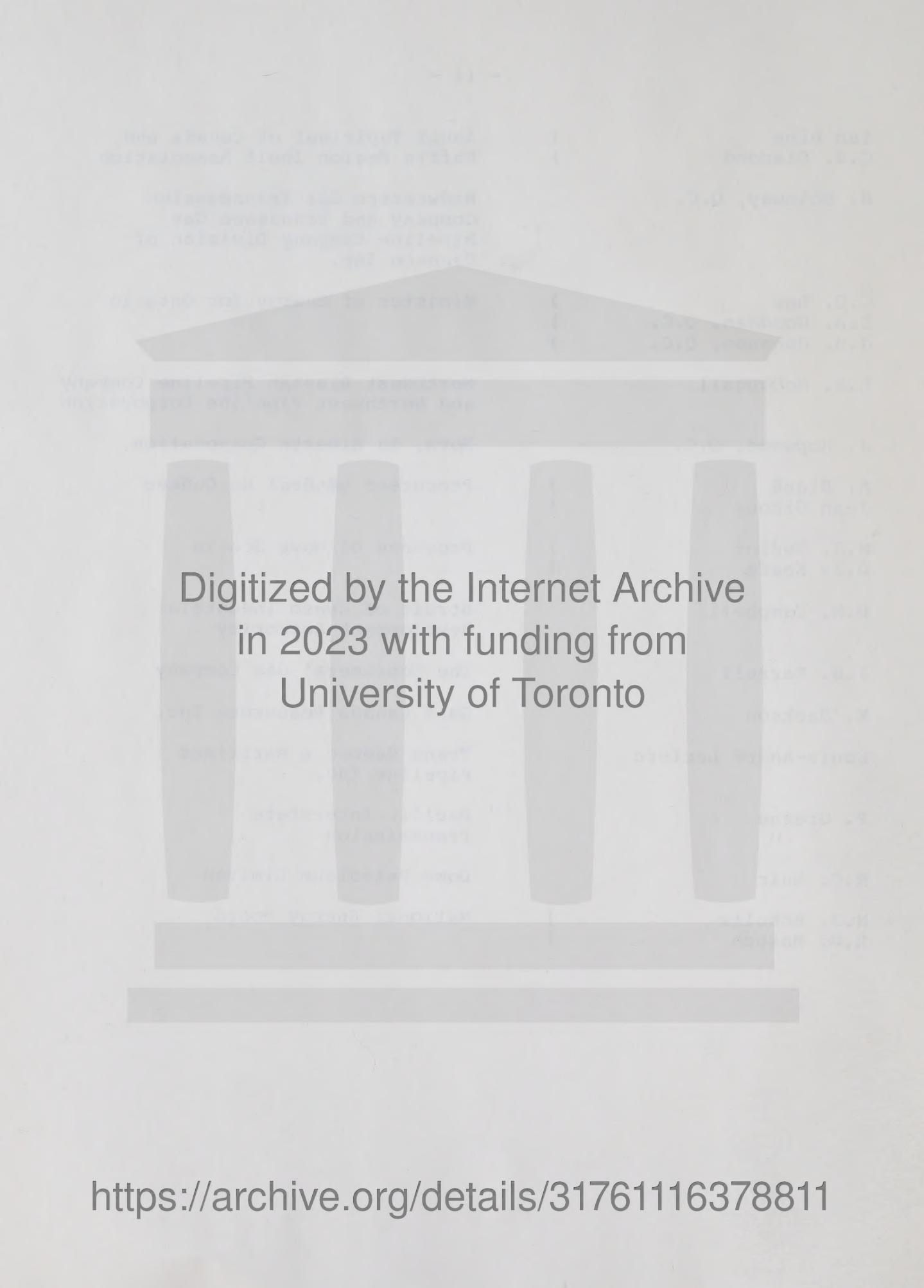
Heard at Ottawa, Ontario on 2, 3, and 4 November 1981.

Before:	L.M. Thur	)	Presiding Member
	J. Farmer	)	Member
	J.R. Jenkins	)	Member

Appearances:

R.J. Gibbs, Q.C.	)	Arctic Pilot Project Inc.
B. Wallace)	
John Francis, Q.C.	)	TransCanada PipeLines Limited
J.M. Murray)	
F. Bregha		Canadian Arctic Resources Committee
P.L. Fournier		Canadian Petroleum Association
G.D. Nichols	)	Consolidex Gas and Oil Limited
S. McAllister)	
Howard Wetston		Consumers' Association of Canada
André Joncas		La Corporation de promotion industrielle de la région de Rivière-du-Loup
Y. Brisson		Gaz Inter-Cité Québec Inc.
M.M. Peterson		Gaz Métropolitain inc.
G. Gilmour	)	Government of the Northwest Territories
A. Zariwny)	
G.D. Nichols		Internorth (Northern Natural Gas Company)

Ian Blue C.J. Diamond	)	Inuit Tapirisat of Canada and Baffin Region Inuit Association
H. Soloway, Q.C.		Midwestern Gas Transmission Company and Tennessee Gas Pipeline Company Division of Tenneco Inc.
C.C. Lax E.A. Goodman, Q.C. J.M. Johnson, Q.C.	)	Minister of Energy for Ontario
E.B. McDougall		Northwest Alaskan Pipeline Company and Northwest Pipeline Corporation
J. Hopwood, Q.C.		Nova, An Alberta Corporation
A. Bigué Jean Giroux	)	Procureur général du Québec
M.J. Veniot D.J. Keefe	)	Province of Nova Scotia
D.M. Campbell		Strait of Canso Industrial Development Authority
J.H. Farrell		The Consumers' Gas Company
M. Jackson		Gulf Canada Resources Inc.
Louis-André Leclerc		Trans Quebec & Maritimes Pipeline Inc.
P. Greene		Pacific Interstate Transmission
R.C. Muir		Dome Petroleum Limited
N.J. Schultz R.G. Makuch)	National Energy Board



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PREFACE

These are the reasons for the Board's decision in the matter of Arctic Pilot Project preliminary motions. The decision itself is dated 5 November 1981 and was issued 6 November 1981. A copy is attached as Appendix I to these reasons.

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CHAPTER 1

Background

The Board received an application dated 1 October 1980 by Arctic Pilot Project Inc. for a Licence under Part VI of the National Energy Board Act ("Act") for the export of natural gas from Canada to the United States of America. The Arctic Pilot Project involves the construction of a natural gas pipeline and liquefaction plant on Melville Island in the Arctic, the transport of the liquefied natural gas ("LNG") to eastern Canada and the export of natural gas to the United States of America. The Board also received an application dated 15 October 1980 by TransCanada PipeLines Limited for a Certificate of Public Convenience and Necessity under Part III of the Act authorizing the construction and operation of an LNG receiving terminal and regasification facilities at Gros Cacouna, Quebec, or Melford Point, Strait of Canso, Nova Scotia, and for orders under Part IV of the Act relating to traffic, tolls, and tariffs. Furthermore, the Minister of Energy, Mines and Resources requested that the Board, under section 22(2) of Part II of the National Energy Board Act, carry out a general review of the Arctic Pilot Project and report to the Minister on all matters that appear to the Board to be relevant respecting the present and future public convenience and necessity of the proposed facilities.

On 19 June 1981, the Board issued Order No. GH-3-81 announcing the Board's intention to convene a public hearing with respect to the Part II inquiry and the Part III certificate application to commence no earlier than 1 October 1981. By the

same order, the Board announced, among other things, that the Part VI application for a gas export licence, which included a net export of Alberta gas, would be heard together with other gas export applications in an omnibus hearing to commence on such dates and at such locations as the Board may, by subsequent order, direct.

The Board issued Order No. GH-3-81 well before the hearing date had been selected to provide interested parties with the maximum time to examine the applications and to prepare for the hearing.

Arctic Pilot Project Inc., by letter dated 3 September 1981, amended its application by eliminating the net export of Alberta gas proposed originally. The Board, therefore, determined that the export component of the application should be considered with the other aspects of the Arctic Pilot Project rather than as part of a future omnibus hearing.

To reflect this decision, Order No. GH-3-81 was amended by Order No. AO-1-GH-3-81, dated 25 September 1981.

The amending order stated that the Board would conduct the public hearing in phases, with Phase I devoted to the Applicants' policy position followed by the export application. The Board established 24 November 1981 as the commencement date for Phase I.

CHAPTER 2

The Motions

Inuit Tapirisat of Canada ("ITC") and the Baffin Region Inuit Association ("BRIA") requested, by a Notice of Motion dated 2 October 1981 (as amended orally at the public hearing of the motion), that Order No. AO-1-GH-3-81 be reviewed and rescinded or, in the alternative, changed and varied to require that matters related to the facilities in the Arctic, the southern terminal, ship design and navigational matters, and the socio-economic and environmental aspects of the project be heard prior to general policy matters and the export component of the application.

In the alternative, ITC and BRIA requested an adjournment of the hearing set down by Order No. AO-1-GH-3-81 for at least 90 days subsequent to 24 November 1981. The Board also received a Notice of Motion dated 21 October 1981, on behalf of the Minister of Energy, Province of Ontario, for an order adjourning the hearing to a date at least 90 days after the completion of the filing of all material pertaining to the applications.

ITC and BRIA also requested, by a Notice of Motion dated 25 September 1981, an order directing the Applicants to make an election between Gros Cacouna, Quebec, and Melford Point, Nova Scotia, as the applied-for location of the regasification terminal and withdraw all material inconsistent with the location so elected.

By the same Notice of Motion, ITC and BRIA requested an order that Arctic Pilot Project Inc. give security for ITC's and BRIA's costs in an amount to be determined by the Board.

At the opening of the hearing of these preliminary motions, counsel for ITC and BRIA requested that the Board postpone hearing the motion to rescind or vary Order No. AO-1-GH-3-81 and the alternative motion for an adjournment until the Federal Court of Canada had determined an application by his clients for an order quashing Order No. AO-1-GH-3-81. The Board, not being convinced that there was any impediment to proceeding with the motions, denied the request.

CHAPTER 3

The Motion by Inuit Tapirisat of Canada and the Baffin Region Inuit Association to rescind or vary AO-1-GH-3-81 and the Motions for an adjournment

ITC and BRIA argued that Order No. AO-1-GH-3-81 should be rescinded or varied, and in the alternative, that the hearing be adjourned for at least 90 days subsequent to 24 November 1981.

With respect to the first part of the motion, the Board is not convinced by the arguments of ITC and BRIA that Order No. AO-1-GH-3-81 should be rescinded or varied. It was the opinion of the Board that the amending order would lead to a more orderly and efficient conduct of these proceedings.

The logic of Order No. AO-1-GH-3-81 was well expressed by counsel for The Consumers' Gas Company as follows:

"We say that when this hearing starts -- whenever that may be -- it should start with the export application.

We say that because an export authorization is absolutely critical to the Arctic Pilot Project. Without an export licence, the project as presently constituted must fail. The Applicant tells us that is so, and no one has disputed that assertion.

Consequently, an orderly and efficient approach to the issues to be addressed in this proceeding involves hearing the export application first. Moreover, it seems to us that the export case can be heard more expeditiously than can the facilities aspects of the project."

(Transcript. V.3 pp. 457-458)

The Board, having considered the submissions of all parties, has determined that Order No. AO-1-GH-3-81 should neither be rescinded nor varied except as set out below.

ITC and BRIA argued that their position has been prejudiced by the change in procedure set out in Order No. AO-1-GH-3-81. They stated that they had prepared their case on the assumption that the export component of the Applications would be heard some time after the public hearings provided for in Order GH-3-81. ITC and BRIA noted that they then found themselves faced with an amended hearing order which placed the export component in Phase I of the public hearings, with the issues they were preparing to address moved to a later phase.

The Minister of Energy, Province of Ontario argued that parties could not properly prepare for a public hearing to commence 24 November 1981. Counsel for the Minister noted that the implications of the September amendments to the applications were significant and that consequential revisions were still being received.

The Applicants expressed their concern that an adjournment may involve a delay in the start of the project. The Board has considered this. However, one of the objectives of the public hearing process is to provide all parties with a fair opportunity to participate in the process effectively. This implies that interested parties should have a reasonable opportunity to prepare their case.

The Board is concerned that the amendments to the applications and the resulting amended procedure adopted by the Board may prejudice the ability of parties to prepare for the public hearing. The Board has, therefore, decided that an adjournment of approximately three months from the date of its decision is appropriate. The public hearing of Phase I shall commence in Ottawa on Tuesday, 2 February 1982.

Order No. AO-1-GH-3-81 will be amended accordingly.

CHAPTER 4

The Motion for an Election between Terminal Sites

ITC and BRIA argued that the Board had no jurisdiction to hear the applications in relation to the terminal sites in their present form. TransCanada has proposed that the LNG receiving terminal and regasification facilities be constructed at Gros Cacouna, Quebec, or Melford Point, Strait of Canso, Nova Scotia. Both locations are equally acceptable to TransCanada. ITC and BRIA argued that the Board is required to compel the Applicants to elect between the two terminal sites.

In the alternative, ITC and BRIA argued that, if the Board considered it had the jurisdiction to hear the applications in their present form, the Board would then have the discretion to require the Applicants to elect between the sites and should exercise that discretion in the circumstances of this case.

The Board has concluded that it is under no obligation to compel the Applicants to elect between the terminal sites. Moreover, while it is within its discretion to do so, the Board finds it neither necessary nor desirable to require the Applicants to make an election at this time. The Applicants, however, are expected to provide full documentation for both sites.

CHAPTER 5

The Motion for Security for Costs

ITC and BRIA argued that the Board should order that Arctic Pilot Project Inc. give security for ITC's and BRIA's costs of participating in this hearing in an amount to be determined by the Board.

ITC and BRIA argued that the Board has the jurisdiction to award costs, and should, as a matter of policy, award costs to intervenors such as ITC and BRIA. They further argued that the circumstances of this case justified an order that Arctic Pilot Project Inc. give security for ITC's and BRIA's costs.

Counsel for ITC and BRIA argued that the jurisdiction to award costs is conferred by section 10 and in particular subsection 10(3) of the National Energy Board Act R.S.C. 1970 c. N-6. Section 10 reads as follows:

"10.(1) The Board is a court of record.
(2) The Board shall have an official seal, which shall be judicially noticed.

(3) The Board has, with respect to the attendance, swearing and examination of witnesses, the production and inspection of documents, the enforcement of its orders, the entry upon and inspection of property and other matters necessary or proper for the due exercise of its jurisdiction, all such powers, rights and privileges as are vested in a superior court of record. 1959, c.46, s10."

Counsel for ITC and BRIA argued that the power to award costs is an inherent power of a superior court; that the Board has by virtue of subsection 10(3) "with respect to ... matters necessary or proper for the due exercise of its jurisdiction, all

such powers, rights and privileges as are vested in a superior court of record"; and, therefore, that Parliament has conferred on the Board the power to award costs.

To support the proposition that the awarding of costs is a matter necessary or proper for the due exercise of the Board's jurisdiction, counsel for ITC and BRIA referred to the decisions of other regulatory tribunals - the Canadian Radio-Television and Telecommunications Commission, the Alberta Public Utilities Board, and the Newfoundland and Labrador Public Utilities Board. Each of these tribunals, however, has the express power to award costs in its governing legislation.

The Board is not persuaded that it should depart from previous statements that it has no power to award costs. It is, therefore, not necessary to consider the motion for security for costs further. The motion is denied. However, the Board acknowledges the importance of the participation of ITC and BRIA in this public hearing process and notes that ITC and BRIA have received some funding for their intervention. The Board hopes that ITC and BRIA will obtain sufficient funding to participate effectively throughout these proceedings.

DECISIONARCTIC PILOT PROJECT PRELIMINARY MOTIONS

The following is the Board's decision on motions argued November 2 - 4, 1981. Written reasons will follow.

1. On the motion by the Inuit Tapirisat of Canada (ITC) and the Baffin Region Inuit Association (BRIA) to rescind or vary AO-1-GH-3-81 and in the alternative to adjourn for at least 90 days subsequent to November 24, 1981, and on the motion by Ontario to adjourn for 90 days after receipt of all material pertaining to the application, the Board has considered the submissions of the parties and has determined that AO-1-GH-3-81 should neither be rescinded nor varied except as to the date of the hearing.

In light of the amendments to the applications and the concerns expressed by some parties as to their ability to properly prepare for the public hearing, the Board has decided that an adjournment of approximately three months from today's date is appropriate. The public hearing of Phase I shall, therefore, commence in Ottawa on Tuesday, February 2, 1982.

2. On the motion by ITC and BRIA for an order that APP Inc. and TransCanada make an election between the Gros Cacouna, Quebec and Melford Point, N.S. terminal sites, the Board has concluded that it is under no obligation to compel the applicants to select a site. Moreover, the Board does not find it necessary nor desirable to require the applicants to make an election at this time. The applicants, however, are expected to provide full documentation for both sites.

3. On the motion by ITC and BRIA for security for costs, the Board is not persuaded that it should depart from its previous statements that the Board has no power to award costs. The application for security for costs is denied. However, the Board acknowledges the importance of the participation of ITC and BRIA in this public hearing process and notes that ITC and BRIA have received some funding for their intervention. The Board hopes that ITC and BRIA will have sufficient funding to participate effectively throughout these proceedings.

DATED AT OTTAWA

November 5, 1981 at 5:00 p.m.

L.M. Thur
L.M. Thur
Presiding Member

J. Farmer
J. Farmer
Member

J. R. Jenkins
J. R. Jenkins
Member

